REFORM IN CRIMINAL PROCEDURE.

The principal object of judicial punishment is to protect the innocent members of society. The authorities on criminal jurisprudence are agreed that this may most effectively be done by swift and certain punishment. An administration of the law which secures this is far more efficacious to deter from crime than severity in punishment. The common law of England which our ancestors brought to this country with them was unmindful of these great principles of criminal jurisprudence. The legislation of England and America in the eighteenth century punished minor offences severely. The number of crimes which then were capital is appalling. Naturally such legislation led to a reaction. Judges and lawyers were not in sympathy with it and the most ingenious legal subtleties were resorted to, in order to protect a person who was really guilty of some minor offense from a disproportionate punishment.

In this country, as well as in England, the old severity of penal legislation has been altogether reformed. But the old traditions of criminal procedure remain. They are totally inapplicable to existing conditions and require revision as much as the sanguinary penal code of a century ago. They have developed in large cities a certain number of criminal lawyers of whom it may be said as Trollope said of the old Bailey attorneys of his day, that they existed "for the manumission of murderers or the security of the swindling world in general."

1. The first rule which should be changed is that which requires the jury to be satisfied of the guilt of a prisoner beyond a reasonable doubt.[1] This has enabled myriads of criminals to escape just punishment. It may possibly in a few instances have saved an innocent man from undeserved punishment, but the impunity that it has given to actual

[1] This is often stated by judges in a manner even more unreasonable than the rule itself. "To the prisoner it involves everything of earthly desire. * * * You will *therefore* give to the facts, not only their most reasonable construction, but also their most charitable and merciful construction." Such was the charge of BUTLER, J., in Udderzook's case, 1 Best Evid., Morgan Ed., 331.

In People *v.* Egnor (1903) 175 N. Y., 419, 430. Judge Vann dissented, relying upon this rule. But the majority of the Court, under the authority of the section hereinafter referred to, sustained the conviction. See note in 3 COLUMBIA LAW REVIEW 420.

criminals has undoubtedly caused the death or injury of many times the number of those whom it has judiciously shielded. Every facility is given by the law to the ascertainment of truth. A criminal accused of offences against the law has the use of the power of the state to secure the attendance of witnesses, and if he has no counsel the court will assign counsel. It is in the interest of justice that if the jury before whom he is tried are satisfied of his guilt by the fair preponderance of evidence he should be convicted.

2. Another rule which grew up during the Draconic legislation of the past was that it was better that ten guilty men should escape than that one innocent man should be convicted. This maxim overlooked entirely the duty of the State to give protection to the innocent men, who were likely to suffer from the escape of the ten guilty culprits, who, emboldened by impunity, would feel free to prey upon the community. These two maxims may be justly said to have caused the death of manifold more innocent persons than they have protected. In their application another maxim of equal antiquity has been allowed (to use the language of COLERIDGE) to lie "Bedridden in the dormitory of the mind, side by side with the most exploded errors." The maxim is this: "Judex damnatur cum nocens absolvitur." The judge himself is condemned when the guilty is acquitted.

3. One cause of delay in the trial of criminals and of punishment of crime was recently stated by Mr. Justice WOODWARD, of the Supreme Court of New York:[1]

"It is impracticable in most communities to assemble a grand jury oftener than three or four times a year. If the crime is committed immediately after the sitting of one Grand Jury, the criminal, if apprehended, usually has from three to four months before another assembles and before he can be indicted. Until this time he cannot be lawfully tried. Then, for the first time he is formally charged with the crime, and he is then entitled to a reasonable opportunity to procure counsel. If he is unable to do so, the court assigns counsel. In such a case the counsel may be entirely unprepared to deal with the defense, and a decent regard for the rights of his client compels the granting of sufficient time to enable counsel to look into the case and determine upon a line of defense. In the meantime the court adjourns and the case of necessity goes over until the court reconvenes, which may be three or four months hence."

[1] Address at Chatauqua, August 15, 1903.

In many States the right to be tried only upon the indictment of a grand jury is guaranteed by the Constitution. The provision of the Constitution of the State of New York on this subject is as follows :

"Article 1, Section 6: No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the Legislature), unless on presentment or indictment of a grand jury."

In other States this requirement has been abolished. It is always difficult to effect a legal reform by means of a constitutional amendment. Still this has many times been accomplished, and the gain to the public of the additional security which greater promptness in the punishment of crime would give, is well worth the endeavor to procure an amendment to the constitution of those States which do not permit a trial except upon indictment by a grand jury. It is obvious that the rights of the accused are quite as well protected by a hearing before a magistrate as they are by the indictment of a grand jury. The proceedings before the latter tribunal are secret. The accused need not be present. He can only obtain an inspection of the minutes by a special motion which the court has the discretion to refuse. A hearing before a magistrate on the contrary is public. The accused has ample notice of all the preliminary proofs. He could not complain therefore of the change. On the other hand the grand jury system could still be maintained for the benefit of the state. There are undoubtedly cases where the secrecy of the investigation of the grand jury, and the vast powers of the prosecuting officer before that tribunal, have led to obtaining legal evidence against criminals who would otherwise have escaped. The conviction of John Y. McKane, for the frauds in Gravesend upon the ballot box, is a notable instance of this.[1] Nothing could exceed the skill with which Mr. Edward M. Shepard, who was counsel to the prosecution in that case, used the Grand Jury of the County of Kings as a piece of machinery for the purpose of obtaining the evidence which

[1] People *v.* McKane (1894) 143 N. Y. 455.

was necessary to convict one of the most notable criminals of the present generation.

Mr. Justice BROWN, in delivering the opinion of the Supreme Court in the case of Hawaii *v.* Mankichi (1903) 190 U. S. 197, stated the existing law on this subject and the practice which prevailed in Hawaii at the time of its annexation so clearly that a quotation will show the power of the States on this subject and the reforms that have been effected in some of them:

"We have also held that the states, when once admitted as such, may dispense with grand juries (Hurtado *v.* California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct., Rep. 111, 292), and perhaps also allow verdicts to be rendered by less than a unanimous vote (American Pub. Co. *v.* Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Thompson *v.* Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620).

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"Churches were founded, (in Hawaii) schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors.

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"These laws provided expressly (Sec. 616, Penal Laws of 1897) as follows: 'The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not'.

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"We place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

4. Another provision of law which has enabled many guilty persons to escape is that which gives to persons jointly indicted for a particular crime the right to separate trials. In the famous "electric sugar frauds," for example, the three guilty persons who were indicted demanded separate trials. The first was tried and convicted, but the ex-

pense of the prosecution and the time consumed in the trial were so great, that the District Attorney of New York refused to try the two other accused persons, and they escaped with the entire proceeds of the fraud and went to live in Michigan. When they had settled there, so far from denying their guilt, they boasted of it, to the scandal of the whole administration of justice. Their rights would have been perfectly secured had they all been tried at the same time. In that case the rights of the innocent and industrious members of the community would also have been protected. Under the existing practice the latter were ignored.

5. So much was said in Mr. Wigmore's article in this Review for November, 1903, upon the subject of "New Trials for Erroneous Rulings upon Evidence" that it is unnecessary to go into much detail upon that subject, but we may add some reference to the gross abuses that exist owing to the readiness of appellate courts to grant new trials in criminal cases. In the New York Times of December 7, 1900, is the account of the confession of a negro desperado who was shot while resisting an arrest. He had been indicted for murder, and had been tried three times for the offense. None of these was final. After each a new trial was ordered. While awaiting the fourth trial the culprit escaped.

In the same paper, under date of July 16, 1903, is an account of the lynching of a murderer who had twice been found guilty by a jury and twice been granted a new trial on technical grounds. After a third conviction the multitude, not wishing a murderer loose, took the law into their own hands. On the other hand, in August last, a judge in Tennessee, finding that a negro was arrested for a capital offense which had excited great public feeling and threats of lynching, opened a special term of court, and gave the culprit a speedy trial. This right which is granted by the Constitution of some States, is in most of them more honored in the breach than in the observance. It is probable that if the Justices of the Delaware Supreme Court had thought proper to do what the Tennessee Court did, the shocking lynching which happened there earlier in the year would never have taken place.

The radical fallacy which pervades the treatment by appellate courts of appeals in criminal cases is this. They assume that there was a common law right to an appeal and that the appellate court has no right to consider the merits of a case, but must be guided in its decision by the consideration of technical errors appearing on the record. In point of fact, at common law there was no right whatever to appeal in criminal cases. There is consequently no legal right to a new trial. New trials should be granted in criminal as well as in civil cases only upon the merits, and the appellate court should be free from the limitation of the rule that the trial court has exclusive jurisdiction to determine the issues. In appeals in equity and in admiralty cases the Federal Appellate Courts find no difficulty in passing upon the merits of the whole record on the facts, as well as the law. In the State of New York a somewhat similar jurisdiction in capital cases has been given by statute to the Court of Appeals. Section 542 of the Code of Criminal Procedure provides as follows:

"After hearing the appeal the court must give judgment without regard to technical errors, or defects or to exceptions which do not affect the substantial rights of the parties."

This provision should be applied to all appellate courts.

The evil of the existing practice in civil cases, which is even more flagrant in criminal cases is so clearly stated in a case to which Mr. Wigmore has not referred that we quote from it:[1]

"The learned judge who presided on the second trial presided on the last trial and granted the nonsuit. He saw and heard the testimony of the plaintiff on both trials, and did not believe that the change of his testimony was honest or worthy of belief. The General Term evidently was of the same opinion, for, after a careful examination of the evidence before the Court of Appeals and that given on the last trial, while admitting that the evidence of the plaintiff was somewhat different on the last trial, declined to disturb the decision of the trial court, especially in view of the apparent disingenuousness of the plaintiff in giving his testimony upon the last trial, and his obvious effort to so change his evidence as to avoid the former decision in this case.

"In other words, the court, believing that the plaintiff had changed his testimony falsely, with a view of avoiding the effect of the decision of this court, concluded to disregard his testimony on this trial, and held that what he testified to on the former trial was true.

[1] Williams *v.* D. L. & W. R. R. Co. (1898) 155 N. Y. 161.

"There can be no doubt but the learned courts below, both at Trial and General Term, were actuated in their course by most praiseworthy motives, fully believing that they were promoting good morals, honesty and justice, but the question is, was their holding in accordance with law? On one of the trials it is quite likely that the plaintiff's testimony was truthfully given, but whether on the first or the second trial was for the jury, not the court, to determine.

"It is the province of the former, not the latter, to weigh the testimony given in the light of all the circumstances surrounding it."

What Chief Judge PARKER here in effect says, is, That the existing practice does not promote good morals, honesty, or justice, but is in accordance with law. What possible reason is there for supposing that in the case thus stated the verdict of the second jury would be any more reliable than that of the first. Then why require it? The case had been once submitted to a jury. The appellate court had the benefit of this verdict. With that and the testimony it ought finally to decide the case. The temptation to perjury caused by the practice commented upon by the Chief Justice is great. No State should offer a premium to perjury, as the prevailing practice in most of them does.

6. There is another technical rule in criminal pleading which should be repealed. It is thus stated by the Court of Appeals of New York, in People *v.* Stedeker:[1]

"An exception in a statute must be negatived in pleading, while a proviso need not."

In this particular case the application of this technical rule discharged the criminal. What possible reason in the nature of the case can be given for the distinction thus stated by the court? In all cases it should be enough that the indictment state the crime with clearness sufficient to enable the defendant to understand the charge. All matters of defense or exception should be left for the proof.

Much more might be said upon the subject of this article, but space forbids. The importance of it has been so clearly stated by the President of the United States that we cannot conclude the article better than with a quotation from his letter written in August last to Governor Durbin, of Indiana:

[1] (1903) 175 N. Y., 57, 67.

"And the best and immediate efforts of all legislators, judges, and citizens should be addressed to securing such reforms in our legal procedure as to leave no vestige of excuse for those misguided men who undertake to reap vengeance through violent methods. * * * The substantial rights of the prisoner to a fair trial must, of course, be guaranteed, as you have so justly insisted that they should be; but, subject to this guarantee, the law must work swiftly and surely, and all the agents of the law should realize the wrong they do when they permit justice to be delayed or thwarted for technical or insufficient reasons. We must show that the law is adequate to deal with crime by freeing it from every vestige of technicality and delay."

EVERETT P. WHEELER.